

Before the
Federal Communications Commission
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Implementation of Section 207 of the) CS Docket No. 96-83
Telecommunications Act of 1996)
)
Restrictions on Over-the-Air)
Reception Devices: Television Broadcast)
and Multichannel Multipoint Distribution)
Service)

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To: The Commission

COMMENTS

BellSouth Corporation and BellSouth Interactive Media Services, Inc. (together "BellSouth"),¹ by their attorneys, submit comments in response to the Commission's *Notice of Proposed Rulemaking*, CS Docket No. 96-83, FCC 96-151 (Apr. 4, 1996), summarized 61 Fed. Reg. 16890 (1996) (the "NPRM"). The NPRM is another of the many actions required of the Commission in its implementation of the Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 56 (1996) (the "1996 Act"). In this instance, the Commission proposes a rule to effectuate part of Congress's directive in Section 207 of the 1996 Act "to promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air

¹ BIMS is a wholly-owned subsidiary of BellSouth Enterprises, Inc. ("Enterprises"). Enterprises also owns businesses providing wireless and international communications services and advertising and publishing products. In turn, Enterprises is a wholly-owned subsidiary of BellSouth Corporation ("BellSouth"), which is a widely-held, publicly-traded holding company. Another wholly-owned subsidiary of BellSouth, BellSouth Telecommunications, Inc., provides local exchange service and toll communications services to two-thirds of the population and one-half of the territory within Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee, and network access services to interexchange carriers in those states.

reception of television signals [and] multichannel multipoint distribution service . . .”²

BellSouth supports the Commission’s “presumptive preemption approach for all governmental restrictions on over-the-air reception devices,”³ if modified as suggested herein.

INTRODUCTION

BellSouth, through BIMS, is in the business of developing broadband services applications, including entertainment and interactive applications, which will be delivered by wired and wireless media to residential customers in the Southeast. BellSouth has already been awarded cable TV franchises to serve four communities: Daniel Island, a new development in Charleston, SC; Saint Johns Community/World Golf Village, a new development near Jacksonville, FL; Vestavia Hills, a suburb of Birmingham, AL; and portions of Chamblee, GA, site of a market test of video and interactive services. On April 19, 1996, BellSouth submitted a bid for the New Orleans, LA, Multichannel Multipoint Distribution Service (“MMDS”) licenses which will be sold at auction by a bankruptcy trustee in San Diego, CA, next May 28. The bid is BellSouth’s initial foray into MMDS. However, BellSouth may offer wireless cable service in other markets as digital technology permits and economic and market conditions warrant.

As a company interested in broadband delivery media, BellSouth encourages the Commission to take action “to promote wider choice and full and fair competition among

² The Commission was required also to prohibit restrictions on the reception of direct broadcast satellite services. See §207 of the 1996 Act. As noted throughout the NPRM, the Commission did so recently in *Report and Order and Further Notice of Proposed Rulemaking*, IB Docket No. 95-59, FCC 96-78 (released Mar. 11, 1996), summarized 61 Fed. Reg. 10896 (1996) (“Order and Further Notice”).

³ See NPRM, ¶ 11, p. 6.

various forms of video programming.”⁴ The Commission, since 1983, has made efforts to create wireless cable systems which will be competitive with wired cable systems.⁵

Preemption of state and local restrictions on over-the-air reception devices will help the Commission achieve that goal.

**THE COMMISSION SHOULD RAISE THE STANDARD STATE
AND LOCAL REGULATORY BODIES MUST OVERCOME
TO REBUT THE PRESUMPTION OF UNREASONABLENESS**

Section 207 of the 1996 Act is quite direct in the guidance it affords the Commission:

Within 180 days after the date of enactment of this Act, the Commission shall, pursuant to Section 303 of the Communications Act of 1934, promulgate regulations to prohibit restrictions that impair a viewer’s ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services.

The NPRM, nevertheless, does not propose a *per se* approach to preemption of restrictive state and local regulations.⁶ Instead, the NPRM looks to adoption of a rule which would permit a state or local regulatory body to rebut the presumption that its restrictive regulation is unreasonable.⁷ To rebut the presumption, the proposed rule sets forth a three part showing that the restriction:

- (A) is necessary to accomplish a clearly defined health or safety objective that is stated in the text of the regulation itself;

⁴ See NPRM, ¶5, p. 6.

⁵ See, e.g., *Amendment of Parts 2, 21, 74 and 94 of the Commission’s Rules and Regulations in Regard to Frequency Allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service, Report and Order*, GEN Docket No. 80-112 and CC Docket No. 80-116, 94 F.C.C.2d 1203 (1983); *Amendment of Parts 21 and 74 of the Commission’s Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, Report and Order*, MM Docket No. 94-131 and PP Docket No. 93-253, 10 F.C.C.R. 9589 (1995) (“Report and Order in MM Docket No. 94-131”).

⁶ See NPRM, ¶6, p. 4.

⁷ See NPRM, ¶¶6-7, p. 4, and Appendix A, p. 9

- (B) is no more burdensome to television broadcast service or multichannel multipoint distribution service reception device users than is necessary to achieve the health or safety objective; and
- (C) is specifically applicable on its face to devices designed for over-the-air reception of television broadcast signals or multichannel multipoint distribution service.

See NPRM, Appendix A, Proposed Rule (a)(2), p. 9 However, the proponent of the regulation could not seek a determination that the presumption had been rebutted absent a waiver from the Commission or a “final declaration from the Commission or a court of competent jurisdiction that the presumption has been rebutted.”⁸

BellSouth recognizes the NPRM’s expressed desire to preserve “some measure of local autonomy and provid[e] clarity of application and procedure.”⁹ However, the showing required to rebut the presumption should establish a higher hurdle for state and local regulators than that proposed. The statute speaks in absolute terms, *i.e.*, prohibit restrictions. Any relaxation of that directive should be strictly scrutinized. Otherwise, the door will remain open for state or local regulators to camouflage restrictions based merely on political or hypothetical concerns and circumvent the federal statute.

BellSouth recommends modification of the Proposed Rule. In subsection (a)(2)(A) the term “clearly defined” should be changed to “compelling.” State or local regulators can clearly define any number of health or safety objectives. However, imposition of a restriction in the face of the clear statutory direction should be permitted only if the health or safety objective is a compelling one. Again, rebutting the presumption should require a substantial and substantive showing.

⁸ See NPRM, Appendix A, Proposed Rule (a)(1), p. 9

⁹ See NPRM, ¶7, pp. 4-5.

In adopting regulations, the Commission must demonstrate that there is a “rational connection between the facts found and the choice made.”¹⁰ In this context, the Commission should demand the same of state or local regulatory bodies seeking to rebut the presumption of unreasonableness found in Proposed Rule (a)(1). Thus, it is suggested that the following subsection be added to Proposed Rule (a)(2):

- (D) was adopted only after consideration of reasonable alternative approaches to achievement of the compelling health or safety objective, none of which would permit the achievement of the objective.

If a regulatory body must make this type of showing, it likely will be discouraged from adopting restrictions which are not supported by its own substantive review and analysis.

**ANY RESTRICTION ON MAST HEIGHT FOR
MMDS ANTENNAS SHOULD BE PREEMPTED**

One issue not addressed directly in the NPRM is state or local regulations which restrict the height of the supporting mast for an MMDS over-the-air reception device. MMDS relies on line-of-sight transmissions for the delivery of programming to customers. A state or local limitation on the length of a supporting mast for an MMDS antenna would “impair a viewer’s ability to receive video programming services . . .” in contravention of Section 207 of the 1996 Act. Such a limitation would not be in pursuit of a health or safety objective; it would be done for aesthetic reasons. Aesthetic considerations will not overcome the presumption in the Proposed Rule.¹¹ Furthermore, the cost of entry into the video delivery market would be raised by a mast height restriction because the signal is delivered by line-of-sight transmission. Thus, a new wireless cable provider would have to spend more capital to reach its customers if the mast height is restricted. Accordingly, any

¹⁰ See *City of Brookings Mun. Tel. Co. v. F.C.C.*, 822 F.2d 1153, 1156 (D.C. Cir. 1987).

¹¹ See NPRM, *supra*, at ¶8, p. 5.

regulation affecting mast height for an MMDS antenna should be presumptively unreasonable, and therefore preempted, under the Proposed Rule. Therefore, Proposed Rule (a)(1) should be modified to state, in pertinent part: “Any state or local zoning, land-use, building, or similar regulation, that affects the installation, maintenance, or use of devices (including masts) designed for over-the-air reception of . . .”

**THE COMMISSION WILL REDUCE THE NUMBER OF
UNSUBSTANTIATED WAIVER REQUESTS BY RAISING
THE STANDARD FOR OVERCOMING THE PRESUMPTION**

The NPRM expresses the Commission’s concern about the likely volume of waiver requests. A large number of state and local regulators (and the various associations representing them) participated in the initial notice of proposed rulemaking in IB Docket No. 95-59 concerning preemption of local zoning regulation of satellite earth stations.¹² A large number also have commented in response to the further notice in that docket. Almost certainly, there will be many comments from state and municipal bodies in this proceeding. The potential clearly exists for numerous waiver requests and other filings. However, the Commission can reduce considerably the volume of filings by adopting a reasonable rule that requires these entities to demonstrate that a compelling health or safety objective can be met only by the restrictive regulation they have fashioned. Otherwise, the Commission’s limited resources and the development of MMDS as a truly competitive force to wired cable will not be able to withstand the potential onslaught of filings.

¹² See Order and Further Notice, *supra* note 2, at Appendix I.

CONCLUSION

In conclusion, BellSouth respectfully requests that the Commission adopt the Proposed Rule with the above modifications. Strengthening the rule will avoid adverse impact on the Commission's staff without eliminating state and local entities' ability to meet legitimate health or safety concerns. The modified rule also will further the Commission's goal of seeing MMDS become "a reality, which will benefit the American public by bringing a wireless competitor to cable television."¹³

Respectfully submitted,

**BELLSOUTH CORPORATION
BELLSOUTH INTERACTIVE MEDIA
SERVICES, INC.**

By:



John F. Beasley

William B. Barfield

Thompson T. Rawls, II


BellSouth Corporation

1155 Peachtree Street, NE, Suite 1800

Atlanta, GA 30309

(404) 249-2641

By:



David G. Frolio

David G. Richards

1133 21st Street, NW, Suite 900

Washington, DC 20036

(202) 463-4155


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Their Attorneys

¹³ See, e.g., Report and Order in MM Docket No. 94-131, *supra* note 5, at 9754 (Separate Statement of Commissioner James H. Quello). See also, *Id.* at 9739 (Partial Dissenting Statement of Chairman Reed E. Hundt) ("The Commission has long held out the promise that wireless cable could emerge as an effective competitor in the video marketplace, leading to more consumer choice, better service and reduced prices.").

CERTIFICATE OF SERVICE

I certify that I have this 6th day of May, 1996 served all parties to this action with a copy of the foregoing COMMENTS by hand delivery of a true and correct copy of the same to the parties listed on the attached service list.


Brett Kilbourne

The Honorable Reed E. Hundt, Chairman
Federal Communications Commission
1919 M Street, N. W. - Room 814
Washington, D.C. 20554

The Honorable Rachelle Chong, Commissioner
Federal Communications Commission
1919 M Street, N. W. - Room 844
Washington, D.C. 20554

The Honorable Susan Ness, Commissioner
Federal Communications Commission
1919 M Street, N. W. - Room 832
Washington, D. C. 20554

The Honorable James H. Quello, Commissioner
Federal Communications Commission
1919 M Street, N.W. - Room 802
Washington, D.C. 20554

Ms. Meredith Jones, Chief
Cable Services Bureau
Federal Communications Commission
2033 M Street, N.W., Room 918
Washington, D.C. 20554

Ms. Jacqueline Spindler
Cable Services Bureau
Federal Communications Commission
2033 M Street, N.W., Room 700D
Washington, D.C. 20554

Ms. Randi Albert
Cable Services Bureau
Federal Communications Commission
2033 M Street, N.W., 700Q
Washington, D.C. 20554